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1. Introduction

One of the most important objections to popular vote processes is that they may lend themselves to tyranny of the majority. That fear was already present in the minds of the founding fathers of the United States. James Madison (2009a: 49) maintained that with direct participation of citizens in government decision-making, "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority". Therefore, he thought that it was "of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part" (Madison 2009b: 121).

The concern that referendums lead to less considered and enlightened decisions than parliamentary decision-making and, even more precariously, may be used to oppress minorities is the common thread running through all three replies to the lead piece by Francis Cheneval and Alice el-Wakil (2018). Richard Bellamy (2018: 313) argues that referendums "risk being a mechanism whereby a majority dominates a minority". Simone Chambers (2018: 305) thinks that "populist majoritarianism is an ever present danger of referendum democracy" that needs to be countered through inclusion of deliberative elements. Similarly, Hélène Landemore (2018: 323) focuses on how popular vote processes can be made more deliberative "to ensure that people vote in a minimally enlightened way".

My contribution will explore whether the fear of a tyranny of the majority through referendums is justified (Section 3) and how the risk of oppression of minorities can be averted (Section 4). First, however, I will suggest that, while Cheneval and el-Wakil's call to differentiate between different types of popular vote processes is fully warranted, they do not go far enough in drawing distinctions and advocate a too narrow concept of the referendum (Section 2). As a lawyer, I was surprised that the four pieces are only very marginally concerned with the legal design and framework of existing popular vote processes and, thus, with the realities of direct-democratic practice. Therefore, my contribution is also an attempt to link the rather theoretical considerations of the other authors to the actual practice of referendums.

2. The Diversity of Popular Vote Processes

Cheneval and el-Wakil (2018) argue that what they call "popular vote processes" can make a positive contribution to representative systems of democracy, but that there is a need to differentiate between different types of processes. They think that such processes are beneficial if they (1) are conceived as a right to refute specific pieces of legislation, (2) are launched bottom-up (rather than mandatory or initiated from above), and (3) lead to legally binding results.

The importance of taking into account the diversity of popular vote processes cannot be overstated. In fact, I would go further than Cheneval and el-Wakil and suggest that there is an additional dimension that needs to be considered: The beneficial (or otherwise) effect of referendums depends not only on the type of process used, but – perhaps even more importantly – on the political system within which a referendum is to be deployed and, thus, on the constitutional structure of the state (or sub-state entity) concerned. It is impossible to assess a popular vote process without having regard to its interaction with the representative part of a system (Hug 2009). Cheneval and el-Wakil (2018: 296) seem to downplay this dimension when they categorically state that "there is no trade-off between including popular vote processes and preserving the institutions of representative democracy". I think it is debatable whether, for example, introducing bottom-up referendums in a system such as that of the United Kingdom (which relies on parliamentary sovereignty and a clear allocation of political accountability) would not alter the distribution of institutional power in the legislative process to the point that, although the institutions of representative democracy might be preserved, the system would essentially no longer be the same. On the other hand, providing for the mandatory referendum for deciding the most fundamental issues, an instrument not favoured by Cheneval and el-Wakil (2018), may be perfectly compatible with a Westminster system of government. Ireland and Australia, for example, have a very long experience with the mandatory referendum. This is not to argue for or against particular forms of popular vote processes, but merely to point out that the effects of introducing such processes will vary depending on the representative system of the state concerned.

Chambers (2018) surmises that the type of referendum favoured by Cheneval and el-Wakil (2018), the bottom-up right to reject legislation, is not widely used. This is not quite correct: The "Navigator to Direct Democracy" lists 165 such instruments, existing at various levels (local, regional, national) in 19 states of the world.[1] Nevertheless, I agree with Chambers (2018) that if one only sees virtue in the type of instrument identified by Cheneval and el-Wakil (2018), this would amount to an extremely limited understanding of the referendum. I do not think that there is a reason for narrowing down the concept of the referendum in this manner. There are many other forms of popular vote processes that, as is demonstrated by their use in practice, make perfect sense.

One of them is the citizens' initiative, an instrument that Cheneval and el-Wakil (2018) explicitly exclude from the remit of their contribution. If its procedure is well designed, thresholds are appropriately defined etc., the initiative constitutes an instrument that allows minorities to place a particular issue on the political agenda and, eventually, to prevail over those who have the majority in parliament (e.g., Schiller and Setälä 2012: 9-11). This makes it a popular vote process that may be especially valuable in a pluralist society, which is characterised by its diversity of individual preferences (Bellamy 2018) and where an individual may belong to a minority with regard to one issue and to the majority with regard to another.

Another instrument that may make a positive contribution to a representative system of democracy is the mandatory referendum. Cheneval and el-Wakil (2018) are opposed to mandatory referendums because, according to them, they cause a waste of resources by forcing popular votes on issues that may be uncontroversial. They only see a role for them where bottom-up referendums are not available.

[1] http://www.direct-democracy-navigator.org/democratic_instruments [accessed: 19.07.2018].

I do not share this scepticism of the mandatory referendum. Why should the most fundamental issues facing a political community not automatically be subject to a popular vote? In fact, this is the most obvious place for including citizens in the decision-making process so as to promote their "ownership" of the state's fundamentals (Chambers 2018: 306). Of course, this raises the question of what is to be defined as "fundamental" (see Landemore 2018). Most political communities have not found it difficult to define what these issues of major significance include: amendments of the constitution, the transfer of authority to international or supranational organisations, and questions concerning territorial integrity or national self-determination. When reserved for these key issues, the concern that mandatory referendums could lead to a waste of resources is unfounded. In Ireland, for example, popular votes have been held roughly every other year over the last few decades, an interval that can hardly be described as "too burdensome" (Cheneval and el-Wakil 2018: 298). On the contrary, thanks to the mandatory referendum, such crucial decisions as ratification of the major EU treaties and the Good Friday Agreement, abolition of the death penalty, amendments of the voting system for parliamentary elections, and legalisation of same-sex marriage have been legitimised through a popular vote. In the latest mandatory referendum, held in May 2018, Irish voters decided to repeal the ban on abortion.

There is no reason why mandatory popular votes on such fundamental issues should not be combined with the bottom-up referendum, which allows citizens to determine further issues as worthy of being subject to a popular vote. If the mandatory referendum were indeed a mere waste of resources, it would hardly have become the most widespread of all popular vote processes. More than half of the states of the world have provisions for mandatory referendums of some sort (Beramendi et al. 2008: 202–211).

In contrast, I share Cheneval and el-Wakil's (2018) scepticism of top-down and consultative referendums. As pointed out by them, these forms of referendum leave the government a very wide scope of discretion and thus ultimately enhance its power, rather than that of citizens. This wide scope of discretion, including with regard to the formulation of the referendum question and the determination of the effects of the popular vote, is also problematic from a legal perspective. According to the right to vote, guaranteed by virtually all constitutions of the world as well as Article 25 of the International Covenant on Civil and Political Rights, voters must be free to form an opinion and to express their wishes. This implies that the question put to the vote must be clear and not misleading and that the effects of the referendum must be specified by law, so that voters are able to foresee the consequences of their vote.[2]

Unlike Cheneval and el-Wakil (2018), I do not think, however, that there can never be a place for top-down referendums. Again, one must also take into account the constitutional framework of the state concerned. If the government's discretion in organising a referendum is reduced to a minimum through legal requirements regarding the formulation of the referendum question, excluded issues, information of the public etc., then having top-down referendums may be better than having no popular vote processes at all.

[2] See Code of Good Practice on Referendums, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007), CDL–AD(2007)008rev, p. 7 ("The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote.")

3. Tyranny of the Majority?

Decision-making in parliament is characterised by mechanisms of deliberation (such as committee meetings and expert hearings) and bargaining processes promoting compromise that tend to protect the interests of minorities. Bellamy (2018) thinks that citizens cannot achieve such compromise for themselves and that referendums, by extracting a single issue from a package, allow an organised minority to contest compromises among elected representatives. Similarly, Claus Offe (2017: 19) argues that referendums eliminate the space for arguing, bargaining, and compromise-finding. According to Bellamy (2018), referendums are especially damaging in segmented societies because they can be used by one minority to appeal to the majority in a way that risks dominating other minorities.

However, practice shows that, in political systems providing for popular vote processes, compromise is not only possible but may indeed be facilitated by the availability of such processes. Due to the threat of a bottom-up referendum, the parliamentary majority needs to take into account the interests of all stakeholders, including those of minorities, in the legislative process. Thus, in Switzerland, the bottom-up referendum has proved to be a key factor for the creation of a "consociational" democracy and an engine for the integration of minorities into the political system (Linder 2012: 24-25, 267-268, 334-335; Neidhart 1970; Papadopoulos 2001; Vatter 2000). Instead of leading to a domination of minorities, it has contributed to its prevention.

My point is not that direct-democratic instruments will always promote compromise, but merely that whether they promote or prevent it will depend on many different factors, including the constitutional framework of the state concerned and the formal design of the instrument. If, for example, there is concern that certain provinces, states, or cantons within a federal state could be persistently disadvantaged, approval by a majority of them, or even by all of them that are directly affected, may be required[3] or federal entities can be granted the right to trigger a referendum.[4] It is ironic that Bellamy (2018: 315, 317) would refer to Switzerland and Belgium as examples of "segmentally divided societies" where, according to him, referendums pose a particular risk. Switzerland has, of course, the most elaborate system of direct-democratic mechanisms in the world, with numerous popular votes held every few months. By all accounts, its political system has been rather successful at integrating the various linguistic, cultural, and religious minorities; indeed, Switzerland has been described as "a paradigmatic case of political integration" (Deutsch 1976, my translation). Belgium, in contrast, is one of the very few European states that do not provide for any popular vote processes at all. Instead of helping bridge the divide between the two large linguistic groups, the Belgian political system has arguably contributed to its worsening, to the point that partition has become a realistic prospect.

Of course, there may be instances where popular vote processes can undermine compromise and result in the domination of a minority. However, this is not the rule. Contrary to Chambers' (2018) claim, there is only sparse empirical research that investigates how minorities fare in direct democracy (Gamble 1997; Haider-Markel et al. 2007; Hajnal et al. 2002). Measuring the effects of popular vote processes on the rights of minorities is problematic for a number of reasons, not least because it is difficult to

[3] According to Section 128 of the Australian Constitution, to pass a (mandatory) referendum, a constitutional amendment must achieve a majority of voters nationwide as well as separate majorities in a majority of states. Where an amendment directly affects a state, a majority of voters in that state must also agree to the amendment.
[4] Article 141(1) of the Swiss Federal Constitution provides that a referendum can be triggered by 8 (out of the 26) cantons.

compare the results to what would be the outcome in a system of representative democracy (Moeckli 2011: 778). This has led John Matsusaka (2005: 168) to conclude that "[u]nfortunately, there is little rigorous empirical work on this issue, and the work that does exist rests on flawed methodologies".

Only with regard to one type of minority groups is there reliable evidence that suggests that it tends to lose out in popular vote processes, namely those that sociology describes as "outgroups": those that are perceived as "alien" and not well integrated into society (Vatter and Danaci 2010: 212–213, 219). Whether a particular minority constitutes an "outgroup" or not will vary from society to society. Whereas in Ireland and Australia majorities of voters decided to grant homosexual couples the right to marry, referendums in Croatia, Slovakia, and Slovenia resulted in a rejection of same-sex marriage. Thus, only when certain, very specific conditions apply, do popular vote processes raise the danger of a tyranny of the majority. Can, and should, this danger be averted through imposing limits on referendums?

4. Limits on referendums

Cheneval and el-Wakil (2018: 296) seem to answer the question in the affirmative when they state that "[c]ompletely undesirable outcomes need to be excluded beforehand by restricting the scope of majoritarian government". Bellamy (2018: 312) takes this to be a reference to "some form of constitutional constraints", although, as he points out, it remains unclear what values would render a decision "completely undesirable". Chambers (2018) argues that Cheneval's and el-Wakil's (2018) statement can be understood in two different ways: First, it could mean that referendums ought to take place in a constitutionally safe space, including protection of minority rights by the courts. Second, it could imply that certain issues must be excluded from decision-making by popular vote.

Chambers (2018) correctly identifies the two types of limits of direct-democratic decision-making. The first is judicial review of implementing measures after the popular vote. In most states, measures that have been approved by voters can be reviewed by courts in exactly the same way as measures decided by parliament. It is, therefore, not clear to me why Chambers (2018: 305) comes to the conclusion that "[c]onstitutional road blocks are not always available" and, in the context of the Swiss ban on minarets, that there are not sufficiently strong judicial safeguards. Where judicial safeguards do exist against laws passed by parliament, they normally also exist against those approved in a popular vote. The Swiss Federal Court has made it clear that, if a minaret ever was prohibited from being built (which has not been the case yet), it would give precedence to the freedom of religion and the prohibition of discrimination guaranteed by the European Convention on Human Rights over the constitutional ban on minarets.[5] That a measure has been introduced by way of a popular vote does not mean that the usual legal safeguards are removed.

The second type of limit is the exclusion of certain issues from the scope of direct-democratic instruments, so that popular votes on these issues are prevented in the first place. Virtually all states know this type of limit. In Switzerland, the only substantive bar to citizens' initiatives are peremptory norms of international law (including, for example, the prohibition of torture and the prohibition of slavery),[6] which explains why the vote on the minarets ban was allowed to go ahead. In other states, the list of excluded issues is

[5] BGE [decisions of the Swiss Federal Court] 139 I 16 of 12 October 2012, para. 5.

[6] Article 139(3) of the Swiss Federal Constitution.

longer. The Portuguese Constitution, for instance, rules out referendums on, among other issues, amendments of the constitution, amnesties and pardons, and the ratification of treaties.[7] The key value to be protected by all lists of excluded matters is the rule of law, more specifically compliance with norms of a certain rank (norms contained in international treaties or the constitution) and/or significance (human rights guarantees). The purpose of these lists is to prevent a dilemma from arising: If popular votes on these issues are allowed to go ahead, then there is, after an affirmative vote, only the choice to either respect the outcome and thus create a conflict within the legal system (between the newly adopted measure on the one hand and international law, constitutional provisions, and/or human rights guarantees on the other) or to ignore, or at least not fully implement, it. The first solution creates legal uncertainty, the second is, in view of the special legitimacy and finality ascribed to popular votes, bound to lead to political controversy.

It is crucial that referendums are made to comply with the rule of law in general and human rights guarantees in particular, be it through a review of implementing measures after the vote, be it through excluding certain issues from popular votes from the start, be it through both. In that regard, I am in agreement with Chambers (2018) who argues that the outcomes of popular vote processes become "undesirable" when they undermine the conditions of legitimate referendums themselves. Human rights are the core of these conditions: they are the lifeblood of democracy, their effective protection is a prerequisite for its very existence.

5. Conclusion

One should be wary of generalised statements that referendums – or particular types of referendums – are good or bad. The reality is much more complex. Whether a popular vote process has beneficial or damaging effects depends on a myriad of factors, in particular its formal design and the constitutional structure of the state concerned. Similarly, sweeping claims that referendums result in the oppression of minorities should be approached with a good dose of scepticism. A look at actual direct-democratic practice shows that the danger of a tyranny of the majority is limited to very specific circumstances. Insofar as this danger does exist, damaging effects of referendums for minorities can be, and in fact often are, prevented through judicial review after the vote and exclusion of certain issues from referendums from the start.

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[7] Articles 115, 161, and 164 of the Constitution of Portugal.

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